

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION**

ENVIRONMENTAL DEFENSE FUND;
MONTANA ENVIRONMENTAL
INFORMATION CENTER; and CITIZENS
FOR CLEAN ENERGY,

Plaintiffs,

v.

U.S. ENVIRONMENTAL PROTECTION
AGENCY; and ANDREW R. WHEELER, in
his official capacity as Administrator of
the U.S. Environmental Protection
Agency,

Defendants.

Case No.: 4:21-cv-00003-BMM-JTJ

The Honorable Brian Morris,
Chief Judge

**PLAINTIFFS' MOTION TO EXPEDITE THEIR MOTION FOR
PARTIAL SUMMARY JUDGMENT AND FOR LEAVE
TO EXCEED THE WORD LIMIT**

In their motion for partial summary judgment, the plaintiffs seek urgent relief on Count Two of their complaint: a declaration that the EPA's final rule will not become effective until February 5, 2021—30 days after its publication date—as the Administrative Procedure Act requires. *See* 5 U.S.C. § 553(d). This requested relief will be meaningful only if the Court grants it significantly in advance of that February 5 effective date. Accordingly, the plaintiffs respectfully request that the Court expedite consideration of their partial summary-judgment motion in order to resolve

it by January 28, 2021. To facilitate expedited review, the plaintiffs also respectfully seek leave to exceed the word limit in their brief supporting the motion.

The EPA's unlawful decision to attempt to make its rule effective immediately on publication injures the plaintiffs by eliminating the mandatory 30-day notice period in which they would otherwise be entitled to petition the agency to postpone the rule's effective date. The APA creates a mechanism by which the public can petition to postpone the effective date of a rule that has been published in the Federal Register but has not yet taken effect. *See* 5 U.S.C. § 705 (authorizing an agency, in certain circumstances, to “postpone” a rule's effective date). A rule that is already in effect, however, by definition cannot be “postpone[d].” *See Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017); *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 113 (2d Cir 2018). For that reason, the plaintiffs' requested relief—a declaration by this Court that the rule becomes effective on February 5, 2021—will be meaningful only if it is granted in time for the plaintiffs to petition the agency and obtain consideration of postponement before February 5. Otherwise, it will be too late to petition, and the plaintiffs' injury will become irreparable.

The plaintiffs therefore respectfully request that the Court grant a partial final judgment under Rule 54(b) on their section 553(d) claim by January 28, 2021, which will allow seven days for the plaintiffs to petition the agency and for the agency to address the petition. Because the question of whether the EPA violated section 553(d)

is a discrete and straightforward question of law that requires no factual development, it is appropriate for partial summary judgment at this time.

To ensure the Court has adequate time to consider and decide the motion by January 28, the plaintiffs respectfully request the following expedited briefing schedule:

Defendants' Response Brief: January 19, 2021

Plaintiffs' Reply Brief: January 21, 2021

If the government requests additional time in which to respond, the plaintiffs will not oppose reasonable modifications to this proposed schedule—provided that the schedule still allows the Court sufficient time to resolve the motion by January 28.

In addition, the plaintiffs respectfully request that the Court allow the brief in support of their motion for partial summary judgment to exceed the word limit set by Local Rule 7.1(d)(2)(A) by accepting for filing the plaintiffs' brief of 10,815 words. The plaintiffs have used the additional words to preemptively address the issue of the plaintiffs' Article III standing, in anticipation of the possibility that the government will raise that issue. Allowing the plaintiffs to brief the issue now will facilitate this Court's expedited consideration of the motion by presenting at the outset an issue that would otherwise not be addressed by both parties until the plaintiffs file their brief in reply.

Because counsel for the defendants have not yet entered an appearance in this action, the plaintiffs have not consulted with the defendants about this motion, as contemplated by Local Rule 7.1(c)(1). In addition to the required service, the plaintiffs are providing courtesy notice to the government of the filing of this lawsuit by simultaneous emails to the U.S. Attorney's Office and the relevant components of the U.S. Department of Justice.

January 11, 2021

Respectfully submitted,

/s/Deepak Gupta

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* *Pro hac vice* applications pending

CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2021, I electronically filed this motion through this Court's CM/ECF system. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

January 11, 2021

/s/ Derf Johnson
Derf Johnson